

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

BEFORE GREGORY J. LAVELLE, ESQ., FACT-FINDER

IN THE MATTER OF FACT-FINDING BETWEEN:

FRATERNAL ORDER OF POLICE, OHIO LABOR)	CASE NO. 2017-MED-01-0008
COUNCIL, INC.)	
)	
Employee Organization)	
)	
and)	REPORT AND RECOMMENDATION
)	OF THE FACT-FINDER
MARION COUNTY SHERIFF)	
)	
Employer)	

APPEARANCES:

EMPLOYEE ORGANIZATION:

Chuck Choate	Staff Representative
Patrick Albright	Dispatcher Representative
Shawn Thorpe	Dispatcher Representative
Daniel Werling	Dispatcher Representative

EMPLOYER:

Jonathan Downes, Esq.	Labor Counsel
Tim Bailey	Sheriff
Aaron Corwin	Chief Deputy
Candice Dewitt	Budget Director
Jeff Cline	Major
Darrin Tolle	Lieutenant
Kelly Bates	Administrative Assistant

September 5, 2017

BARGAINING HISTORY

Fraternal Order of Police, Ohio Labor Council, Inc. (hereinafter, the F.O.P.) was a party to a collective bargaining agreement with the Marion County Commissioners (hereinafter, the County) and the Marion County Sheriff (hereinafter, the Sheriff) which covered Deputies and Dispatchers. The F.O.P. was also a party to a collective bargaining agreement with the City of Marion (hereinafter, the City), covering Communications Officers and Community Service Technicians (hereinafter, the City Dispatch Agreement) effective from May 1, 2014 through April 30, 2017.

The City, during the term of the City Dispatch Agreement, determined to subcontract its dispatch function to the County. The City, the County and the FOP negotiated for a collective bargaining agreement to cover a combined Dispatch Unit. Agreement was reached for a collective bargaining agreement between the F.O.P. and the Sheriff and County effective through April 30, 2017 to cover all Dispatchers (hereinafter, the Combined Dispatch Agreement). Deputies remained covered under the provisions of the prior agreement which expires on September 30, 2017 (hereinafter referred to as the Deputies Agreement). The FOP also represents a separate unit of Lieutenants under a collective bargaining agreement with the County and the Sheriff which also expires of September 30, 2017 (hereinafter referred to as the Lieutenants Agreement).

The parties attempted to negotiate a successor agreement to the Combined Dispatcher Agreement. The parties reached a number of tentative agreements relative to several provisions of the agreement, including a provision identifying the employer party to the agreement as the Sheriff, rather than the County and the Sheriff. The parties, however, were unable to reach complete agreement on a new collective bargaining agreement.

The Fact-Finder was appointed on May 31, 2017. The parties requested that mediation be attempted. A mediation session was scheduled for July 12, 2017 with an additional date of July 18, 2017 being agreed for Fact-Finding. Mediation was conducted on July 12, 2017, but full agreement was not reached. Further mediation was conducted on July 18, 2017. Agreement was not reached and it was

determined that the matter proceed to Fact-Finding. Since all issues had been fully discussed during the extensive mediation sessions, it was determined that Position Statements would not be necessary and were waived. It was agreed that final proposals of the parties and arguments and evidence relative thereto were to be provided to the Fact-Finder by August 18, 2017 and for the Fact-Finder to forward the same to the opposing parties. It was further agreed that the fact-Finding Hearing was to be conducted by conference call on August 21, 2017 commencing at 3:00 p.m. and that the Report and Recommendation of the Fact-Finder be delivered to the parties on September 5, 2017.

The parties timely submitted their written arguments and evidence. Tentative agreements were confirmed as shown in Exhibit A. The documents submitted were exchanged between the parties and the hearing was conducted by teleconference on August 22, 2017. The documents, arguments and other evidence submitted by the parties has been reviewed and this Report and Recommendation is hereby issued.

RECOMMENDATION

NATURE OF THE DETERMINATIONS

The issues presented herein were reviewed in accordance with the provisions of Ohio Administrative Code 4117-9-05(k), the Fact-Finder considering:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;

(6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

DISCUSSION OF THE ISSUES

DISCUSSION OF PARTIES TO THE COLLECTIVE BARGAINING AGREEMENT

The parties have not explicitly raised an issue before the Fact-Finder as to the parties to the new collective bargaining agreement. The bargaining history of the tentative agreements and the submissions of the parties, however, create a potential issue. The parties, on March 17, 2017, came to a tentative agreement with respect to Article 1, Agreement, Section 1.1, Purpose, in which the employer party to the collective bargaining agreement was changed from the "County" to the "Sheriff". The proposals of the Sheriff, however, left intact on the proposed cover page for the new collective bargaining agreement a description of the parties which implies that the County remains a party to the agreement. This ambiguity may create serious issues in the future. Therefore, the recommended cover page to the new collective bargaining agreement which also addresses the proposed language relative to the duration for the new collective bargaining agreement is as shown in the Appendix.

DISCUSSION OF ARTICLE 4, MANAGEMENT RIGHTS

The Sheriff has proposed that Article 4, Management Rights, be modified to be consistent with the language of the Deputies Agreement for the sake of consistency of administration. The F.O.P. opposes the change, but has not expressed any specific concerns regarding the proposed change.

Operational consistency is a valid concern. It should be noted, moreover, that the language proposed by the Sheriff is the same language which had governed the relationship between the Dispatchers and the employer under the prior agreement between the parties. The proposal of the Sheriff is recommended.

DISCUSSION OF ARTICLE 16, HOURS OF WORK AND OVERTIME

The Sheriff has proposed to modify Article 16 to decrease overtime and carry-over compensatory time which, in a small department, leads to “leap-frog overtime” where use of compensatory time by one employee leads to overtime and thus, compensatory time for another employee. The F.O.P. opposes this proposal because of potential loss of income and because of potential loss of flexibility. It appears that there may be a split among employees over the interest in income over the interest in free time, older employees being more interested in income and the newer employees being more interested in free time. One way to look at compensatory time is as an interest-free loan to the employer, the employee giving the employer his overtime money to be paid back, without interest at a later date. The employee could otherwise, bank the money and then use it, and the interest for any purpose. Efficiency and ease of administration are served by decreasing the amount of compensatory time and overtime. The proposal of the Sheriff leads to a new dynamic where flexibility of scheduling is allowed and which would allow employees to request unpaid time off, using their banked money instead of time to cover the absence.

This is not to say that the entire proposal of the Sheriff must be recommended. The proposal of the Sheriff for Sections 16.1, 16.2 and 16.3 are generally accepted, provided, however, that the last sentence of the last paragraph of Section 16.3 is not to be deleted. Eliminating that sentence relative to re-scheduling to avoid paying for overtime already worked would seem to allow abuse, rather than flexibility in scheduling. The proposals of the Sheriff for Sections 16.4, 16.5, 16.6, 16.7, 16.8, 16.9 and 16.10 are also recommended.

The proposal of the Sheriff to eliminate the old Section 16.10, however, relative to compensation for training probationary communications trainees is not recommended. There is no need for “consistency” among the collective bargaining agreements, since there are no probationary communications trainees in any other unit and the Sheriff can avoid any expense of this provision by having training performed by supervisory personnel. It is recommended, therefore, that Article 16 be as shown in the Appendix hereto.

DISCUSSION OF ARTICLE 17, WAGES, LONGEVITY AND SHIFT DIFFERENTIAL

The issue of wages appears simple. The Sheriff proposes a one percent (1%) wage Increase while the F.O.P. proposes a two percent (2%) wage increase. The Sheriff points out that the dispatchers in Marion County are highly paid relative to those in comparable jurisdictions. The F.O.P. argues that a two percent (2%) wage increase is justified due to various take-backs proposed by the Sheriff in terms of time-off banks and overtime. Both arguments have merit. A third consideration is that employees normally should not suffer a loss of purchasing power over the course of time due to inflation. The rate of inflation in the United States for 2016 was 2.07%. (<http://www.usinflationcalculator.com/inflation/current-inflation-rates>) In light of the inflation rate, possible losses of income in terms of overtime and more than likely losses of income due to increases in health care costs, a two percent (2%) increase is recommended, subject to adjustments in the second and third years as described below.

The "increase" is recommended to take place only after execution of the agreement, as will be discussed below. For equity purposes and ease of administration, it is recommended that there be a signing bonus of four hundred dollars (\$ 400.00) for employees on the date of execution which approximates retroactivity for the average employee. ($\$ 22.50 \text{ per hour} \times .02 \times 40 \text{ hours per week} \times 22 \text{ weeks} = \$ 396.00$). All employees as of the time of execution will receive the same bonus regardless of rates of pay and dates of hire.

The Sheriff is correct that the rate of pay for its dispatchers is high compared to that offered by comparable jurisdictions. The Sheriff, however, has bargained those rates with its current employees. The Sheriff has not bargained rates with future employees and may want to take advantage of the current labor market in hiring new employees. Thus, it is recommended that adjustments be made to Step 1, effective May 1, 2018 and in Steps 1 and 2 effective May 1, 2019. The Sheriff, obviously, may choose not take advantage of the changes in the wage scale by hiring at a higher step under the new wage schedule.

The Sheriff has proposed that the pension pickup language of Article 19 be deleted, indicating The overall wage settlement over the course of the collective bargaining agreement is thus somewhat

less than 2%, 2%, 2%. It must also be recognized that by virtue of the change in effective dates, the 2020 wage increase for the Combined Dispatch Unit will take place five (5) months later than would otherwise be expected.

The Sheriff was proposed that Section 17.2, relative to members contribution to the pension fund be deleted as “defunct”. That provision reduced the employer pick-up to zero percent (0%) during the term of the past collective bargaining agreement. With the understanding that the elimination of that provision does not alter the existing practice, it is recommended that said section be deleted.

It is therefore recommended that Article 17, Wages read as shown in the Appendix, section numbers and descriptors being added for clarification.

DISCUSSION OF ARTICLE 19, HOLIDAYS, PERSONAL DAYS AND VACATIONS

The Sheriff proposes to align the holiday article with that of the Deputies Agreement, going from a system of twelve (12) days of compensation; seven (7) named holidays and five (5) personal days to a system of thirteen (13) days of compensation; ten (10) named holidays and three (3) personal days. While, initially, the proposal of the Sheriff increases compensation by eight (8) hours per year in terms of the number of holidays, the proposal decreases compensation by compensating employees at straight time for working holidays instead of compensating them at time and one half. Under the current agreement for Dispatchers there are seven (7) named holidays. Full-time employees working eight (8) hour shifts in a 24/7 operation would be expected to work five (5) of every seven (7) days, thus five (5) of the seven (7) holidays. On each of those five (5) days, employees would lost four (4) hours of compensation for a total of twenty (20) hours. Thus, the change would result in a net loss of twelve (12) hours per year.

Consistency and ease of administration is a concern, but a consistency should not be used to diminish compensation. Therefore, it is recommended that there be a holiday bonus of two hundred fifty dollars (\$ 250.00) to be paid on the first paycheck in December. Because of the confusion which may

result from attempting a mid-calendar year change in holidays, it is recommended that the Sheriff proposal for holidays become effective January 1, 2018 and the bonus be paid only in 2018 and 2019.

The Sheriff also proposes, for the sake of consistency and ease of administration, a change in vacations. The proposal of the Sheriff, however, would still result in two separate vacation schedules for the Combined Dispatch Unit due to red-circling of some employees' vacation accruals and would be even more complicated than the system to which the Sheriff has been administering. To some extent, employees have already worked toward their accrual rates. In addition, the proposed change in the vacation schedule would likely be viewed as a breach of the initial agreement on the combination of units; bait and switch. Therefore, the proposal of the Sheriff with respect to vacations must be rejected with respect to employees hired prior to the execution of the collective bargaining agreement.

While the proposal of the Sheriff with respect to Section 19.9 governing payout of certain types of leave upon the death of an employee is recommended for the sake of having a rule and having consistency among bargaining units, it must be pointed out that there are three (3) separate provisions in the collective bargaining agreement which deal with the payout of types of leave upon death. The various provisions state potentially different qualifications for the payout of paid leave, "paid status" v. "active status" and different potential recipients, all provisions potentially requiring the unnecessary costs and delays of the opening of a probate estate and all provisions potentially leading to litigation against the Sheriff by competing parties. It is therefore suggested that the parties review such provisions and procedures for all units. The "suggestions" of the Fact-Finder shall not be considered to be a formal recommendation, the recommended language of Article 19, Holidays, Personal Days & Vacation being as shown in the Appendix hereto.

DISCUSSION OF ARTICLE 21, HEALTH, LIFE, DENTAL, DRUG INSURANCE

The Sheriff has proposed to make the insurance provisions consistent between the collective bargaining agreements for the Deputies and the Dispatchers. There are a number of differences

between the insurance provisions of the separate contracts. The Combined Dispatchers Agreement requires that “similar levels of coverage” be continued while the Deputies Agreement simply requires that the “Employer” provide “coverage”. There are also provisions in the Deputies Agreement allowing for changes made by carriers. The Deputies Agreement does not contain provisions for HSA payments, insurance opt-out and life insurance. The Deputies Agreement further provides that employees become eligible for coverage on the first day of the month following successful completion of sixty (60) days of employment, rather than immediately upon successful completion of sixty (60) days of employment and provides for a rule regarding employees who have spouses who also work for the County. Seemingly, the only provision for which the Sheriff does not seek consistency with the Deputies Agreement is the 85/15 split in premium sharing rather than the 80/20 split provided in the Combined Dispatch Agreement.

It is a fact of life that employees of the Combined Dispatch Unit will have to be covered by the same insurance plan as other employees of the County and that they will be subject to changes initiated by carriers. Consistency among the collective bargaining agreements is important. As a part of that “consistency”, it must be recommended that the Combined Dispatch Unit have the benefit of the 85/15 split of the cost of insurance premiums to offset the loss of other benefits previously provided under the Combined Dispatch Agreement.

It must be noted that the recommendation for this collective bargaining agreement is that it become effective upon execution. This may create some issues as to the entitlement to benefits which had been provided by the Combined Dispatch Agreement during the period from May 1, 2017 through the date of execution of the new collective bargaining agreement.

The language proposed by the Sheriff identifies the party to the contract as “the employer”, rather than the Sheriff. For the sake of consistency and being mindful of the canons of contract construction which indicate that where parties have utilized different terms, they intended different meanings, the language recommended for Article 21, Health, Life, Dental, Drug Insurance is as shown in the Appendix.

DISCUSSION OF ARTICLE 23, LEAVES, INJURY, SICK, BEREAVEMENT, MILITARY, JURY UNPAID LEAVE

Through professional, good faith and diligent bargaining, many agreements were reached with respect to the language of this article, the proposal of the Sheriff being generally acceptable except with respect to the definition of “active pay status” in Section 23.2 and the definition of “immediate family” in Section 23.10.

The Sheriff with respect to Section 23.2 seeks to have sick leave accrue only while an employee is on “active paid status”, deleting the definition contained in the collective bargaining agreement. The F.O.P. seeks to retain present language. Deleting the current definition implies that the meaning of “active pay status” is to change. The Sheriff, however, has provided no alternative definition, or example of the operation of the proposed provision. The current language is not without problems, utilizing the word “may” instead of shall and potentially leaving open the definition of “approved paid leave”. There are many instances where the parties know what a provision means “despite what it says” and despite the fact that an arbitrator, based on clear language, would interpret the language differently. It is a primary concern of fact-finders and first responders to “do no harm”. It is therefore the recommendation of the Fact-Finder that the definition of “active pay status” be deleted and that the past practice be maintained as shown in the recommended language for Section 23.2 in the Appendix.

The Sheriff proposes with respect to Section 23.10 that the definition of immediate family in the Combined Dispatch Unit be modified to match that of the Deputies Agreement. Many of the proposals of the Sheriff with respect to Article 23 are being recommended. The proposal to tighten up the circumstances under which sick leave may be granted, only allowing the sick leave to be utilized when the employees presence is “required”, instead of “reasonably necessary” is recommended. The proposal to require more documentation for the use of sick leave (Section 23.8) is being recommended. The proposal to allow the Sheriff discretion to deny sick leave for an employee to care for a member of the “immediate family” who does not live with the employee when, to the Sheriff, it does not seem justified (Section 23.10) is being recommended along with a number of other proposals with respect to

Article 23, some of which have real economic consequences. The proposal to change the definition of “immediate family, however, is not recommended. The proposal eliminates the right of employees to utilize sick leave in justified circumstances to care for or even attend the funeral of certain members of blended or non-traditional families. Back in the 1960’s this would not be so much of a concern, but, today in 2017, the blended, or non-traditional family unit is probably the rule, rather than the exception with numerous second marriages. The change in language would deny sick leave to a person seeking to attend the funeral of his live-in fiancée and/or her children or even his live-in step-child. This Fact-Finder would have been affected by this difference in language numerous times. The proposed change in language is not justified by economics. The proposed change, to employees who might perceive that the change in language would deny them sick leave in the future, might even seem to be mean spirited.

The proposed change in the definition of “immediate family” is rejected. The recommended language for Article 23 is as shown in the Appendix.

DISCUSSION OF ARTICLE 28, DURATION

The parties hereto appear to have a mutual desire to have common expiration dates of all collective bargaining agreements. The collective bargaining agreements for the Lieutenants and Deputies expire on September 30, 2017. The parties would be expected to want to negotiate that those agreements expire on September 30, 2020. The Combined Dispatcher Agreement expired on April 30, 2017. It would be illegal under Ohio Revised Code Section 4117.09(E) for the new Combined Dispatcher Agreement to run from May 1, 2017 to October 30, 2020, since a collective bargaining agreement cannot contain an expiration date that is later than three (3) years from the date of execution:

(E) No agreement shall contain an expiration date that is later than three years from the date of execution. The parties may extend any agreement, but the extensions do not affect the expiration date of the original agreement.

The parties could negotiate that the collective bargaining agreements for the other units expire three (3) years from the date of execution of the Combined Dispatcher Agreement. A better solution, however, would be to recommend that a three (3) year agreement for the Combined Dispatcher Unit become effective upon execution and then have the parties, in their mutual self-interest, execute the agreement on October 1, 2017. A recommendation, issued on September 5, 2017, could not state that the collective bargaining agreement would be effective from the date of execution until September 30, 2017, because the agreement might be executed prior to October 1, 2017, creating a collective bargaining agreement which would violate Ohio Revised Code Section 4117.09(E). The fact-finder trusts that the parties will act in a timely manner and in accordance with their mutual self-interests. It is therefore recommended that the Duration Clause read as shown in the Appendix.

CONCLUSION

This Report and Recommendation is intended to address all outstanding issues. However, if either party feels that an issue has not been addressed, it is suggested that a conference call be arranged to discuss that issue. Further, under Ohio Administrative Code 4117-9-05(k)(5), a Fact-Finder is required to consider any stipulations of the parties. The Fact-Finder will consider a joint motion to re-open the hearing for the presentation and consideration of any further stipulated matters.

Respectfully submitted,

/s/ GREGORY J. LAVELLE
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CERTIFICATE OF SERVICE

A true copy hereof was sent by electronic mail to the Marion County Sheriff by electronic mail c/o Jonathan J. Downes, Esq. at jjd@zrlaw.com; to the Fraternal Order of Police, Ohio Labor Council, Inc. by electronic mail c/o Chuck Choate at cchoate@neo.rr.com and to the State Employment Relations Board by electronic mail at med@serb.state.ohio.us to this 5thrd day of September, 2017.

GREGORY J. LAVELLE